

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

STP NUCLEAR OPERATING)	
COMPANY,)	
Petitioner,)	
)	
v.)	PETITION FOR REVIEW
)	
NATIONAL LABOR RELATIONS BOARD,)	
)	
Respondent.)	

PETITION FOR REVIEW

Petitioner STP Nuclear Operating Company (“STP”), petitions the Court to review and set aside, and to the extent the Board seeks enforcement, refuse to enforce, the Decision and Order of the National Labor Relations Board (“Board”) issued as to the alleged unfair labor practices charged against STP in Case No. 16-CA-222349 dated January 16, 2019. A copy of the Decision and Order is attached. The Board’s Decision and Order is a final order within the meaning of Section 10(f) of National Labor Relations Act (“NLRA”), 29 U.S.C. § 160(f), and STP is a party aggrieved by the Decision and Order. The Board’s Decision and Order against STP is not supported by substantial evidence and is contrary to the law and should be set aside.

STP respectfully prays that this Court review and set aside the Board’s Decision and Order, and that STP receive any further relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 28th day of January, 2019, I caused the foregoing to be filed with the United States Court of Appeals for the Fifth Circuit and a copy of same to be served on the following parties of record via e-mail:

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STP Nuclear Operating Company and International Brotherhood of Electrical Workers, Local Union 66. Case 16–CA–222349

January 16, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND EMANUEL

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on June 20, 2018, by International Brotherhood of Electrical Workers, Local Union 66 (the Union), the General Counsel issued the complaint on June 22, 2018, alleging that STP Nuclear Operating Company (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 16–RC–214839. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On July 10, 2018, the General Counsel filed a motion for summary judgment. On July 12, 2018, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be

granted. The Respondent filed an opposition to the General Counsel's motion for summary judgment, response to the Board's Notice to Show Cause, and cross-motion for summary judgment. The General Counsel filed a reply to the response to the Notice to Show Cause and an opposition to the cross-motion for summary judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent denies its refusal to bargain, and contests the validity of the Union's certification on the basis of its contention, raised and rejected in the underlying representation proceeding, that the certification is inappropriate because employees in the newly certified unit are statutory supervisors.¹

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the motion for summary judgment.²

On the entire record, the Board makes the following

¹ In its answer, the Respondent denies the allegations in complaint par. 9, that since about March 14, 2018, the Respondent has failed to recognize and bargain with the Union. In addition, the Respondent only partially admits the allegations in complaint par. 8 concerning the Union's requests for recognition, stating in its answer only that it received and exchanged communications with a representative of the Union on certain dates in March and May 2018. However, the Respondent does not contend that it has bargained with the Union or that its denial of complaint par. 9 raises a genuine issue of material fact warranting a hearing. Further, it does not contest the authenticity of the emails attached to the General Counsel's motion, which include the Union's requests for information and statement that it is ready to start negotiations regarding the petitioned-for employees, as well as an email from the Respondent to unit employees dated June 19, 2018, notifying the employees that it had refused to enter into negotiations with the Union regarding the newly certified unit in order to maintain its position and obtain court review. Rather, in its opposition to the motion for summary judgment, the Respondent makes clear that it is continuing to contest the appropriateness of the unit. Accordingly, for the reasons described above, we conclude that the Respondent's denial of complaint par. 9 and partial denial of par. 8 do not raise any issue warranting a hearing.

The Respondent also denies par. 5 of the complaint, which sets forth the appropriate unit. The unit issue, however, was fully litigated and resolved in the underlying representation proceeding. Accordingly, the Respondent's denial of the appropriateness of the unit does not raise any litigable issue in this proceeding. The Respondent additionally argues as an affirmative defense that the complaint fails to state a claim under the Act upon which relief can be granted. The Respondent has not offered any explanation or evidence to support this bare assertion, beyond its previously litigated contention that the certification is inappropriate because the petitioned-for employees are statutory supervisors. Therefore, we find that this affirmative defense is insufficient to warrant denial of the General Counsel's motion for summary judgment in this proceeding. See, e.g., *Station GVR Acquisition, LLC d/b/a Green Valley Ranch Resort Spa Casino*, 366 NLRB No. 58, slip op. at 1 fn. 1 (2018), and cases cited therein.

² Accordingly, we deny the Respondent's cross-motion for summary judgment and its request that the complaint be dismissed. Chairman Ring did not participate in the underlying representation proceeding. He agrees with his colleagues that the Respondent has not raised any litigable issue in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a Texas corporation with an office and place of business in Wadsworth, Texas (the Wadsworth facility), and has been engaged in the business of electrical generation.

In conducting its operations during the 12-month period ending on June 20, 2018, the Respondent purchased and received at its Wadsworth facility goods valued in excess of \$50,000 directly from points outside the State of Texas.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

At all material times Shawn Flaherty, Manager, External Communications and Governmental Affairs, has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

Following a self-determination election held on March 14, 2018, the Regional Director for Region 16 issued a certification of representative³ on March 22, 2018, certifying that the Union is the exclusive collective-bargaining representative of all full-time and regular part-time Unit Supervisors and Senior Reactor Operator (SRO) Instructors at the Wadsworth facility as part of the existing unit of technicians, electricians, mechanics, reactor operators, and work week managers that it currently represents.

Based on this certification, the following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, as part of the existing unit of all Radiation Protection Technicians, Performance Technicians, Chemistry Technicians, Material Technicians, Metrology Technicians, Maintenance Planners, Operation Support Procedure Writers, Work Week Schedulers, Electricians, Mechanics, I&C Technicians, Material Handlers, Head Material Handlers, Head Operators, Head Radiation Protection Technicians, Head Performance Technicians, Reactor Operators (RO), Work Control Specialists, Work Week Managers, RO/SRO License Operator Trainees, and

Senior Reactor Board Operators at the Respondent's Wadsworth facility:

INCLUDED: All full-time and regular part-time Unit Supervisors and Senior Reactor Operator (SRO) Instructors, who possess an SRO license, employed in the Operations Department to include the Control Room, Nuclear Support Maintenance Operating Facility (MOF), Nuclear Training Facility (NTF) and Maintenance Operations Support Trailer (MOST), at the Employer's Wadsworth, Texas facility.

EXCLUDED: All other employees, office clerical employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees, including the employees in the voting group, under Section 9(a) of the Act.

B. *Refusal to Bargain*

On various dates in March and May 2018, including about March 14, March 26, and May 15, 2018, in person and/or by electronic mail, the Union requested that the Respondent recognize it as the exclusive collective-bargaining representative of the unit as part of the existing bargaining unit. Since about March 14, 2018, the Respondent has failed and refused to do so.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing, since about March 14, 2018, to recognize and bargain with the Union as the exclusive collective-bargaining representative of Unit Supervisors and Senior Reactor Operator (SRO) Instructors as part of the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to recognize and bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.⁴

³ By unpublished Order dated May 17, 2018, the Board denied the Respondent's request for review of this certification.

Although Member McFerran dissented from her colleagues' denial of the Respondent's request for review of the Union's certification, she agrees that the Respondent has raised no new evidence in the instant proceeding and that its defenses were or could have been litigated in the

underlying representation proceeding. Accordingly, she joins her colleagues in the instant Decision and Order.

⁴ The General Counsel's motion requests that the Board extend the certification year pursuant to the Board's decision in *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). Such a remedy, however, is inappropriate where, as here, the underlying representation proceeding involved a self-determination election. See *Winkie Mfg. Co.*, 338 NLRB 787, 788 fn. 3

STP NUCLEAR OPERATING CO.

ORDER

The National Labor Relations Board orders that the Respondent, STP Nuclear Operating Company, Wadsworth, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Electrical Workers, Local Union 66 (the Union), as the exclusive collective-bargaining representative of the Unit Supervisors and Senior Reactor Operator (SRO) Instructors in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit, as part of the existing unit of all Radiation Protection Technicians, Performance Technicians, Chemistry Technicians, Material Technicians, Metrology Technicians, Maintenance Planners, Operation Support Procedure Writers, Work Week Schedulers, Electricians, Mechanics, I&C Technicians, Material Handlers, Head Material Handlers, Head Operators, Head Radiation Protection Technicians, Head Performance Technicians, Reactor Operators (RO), Work Control Specialists, Work Week Managers, RO/SRO License Operator Trainees, and Senior Reactor Board Operators at the Respondent's Wadsworth facility, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

INCLUDED: All full-time and regular part-time Unit Supervisors and Senior Reactor Operator (SRO) Instructors, who possess an SRO license, employed in the Operations Department to include the Control Room, Nuclear Support Maintenance Operating Facility (MOF), Nuclear Training Facility (NTF) and Maintenance Operations Support Trailer (MOST), at the Employer's Wadsworth, Texas facility.

EXCLUDED: All other employees, office clerical employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Wadsworth, Texas, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative,

shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 14, 2018.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 16, 2019

John F. Ring, Chairman

Lauren McFerran, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

(2003), aff'd. 348 F.3d 254 (7th Cir. 2003); *White Cap, Inc.*, 323 NLRB 477, 478 fn. 3 (1997), and cases cited there.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National

Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Electrical Workers, Local Union 66 (the Union) as the exclusive collective-bargaining representative of our unit Supervisors and Senior Reactor Operator (SRO) Instructors in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate unit, as part of the existing unit of all Radiation Protection Technicians, Performance Technicians, Chemistry Technicians, Material Technicians, Metrology Technicians, Maintenance Planners, Operation Support Procedure Writers, Work Week Schedulers, Electricians, Mechanics, I&C Technicians, Material Handlers, Head Material Handlers, Head Operators, Head Radiation Protection Technicians, Head Performance Technicians, Reactor Operators (RO), Work Control Specialists, Work Week Managers, RO/SRO License Operator Trainees, and Senior Reactor Board Operators at the Respondent's Wadsworth facility:

INCLUDED: All full-time and regular part-time Unit Supervisors and Senior Reactor Operator (SRO) Instructors, who possess an SRO license, employed in the Operations Department to include the Control Room, Nuclear Support Maintenance Operating Facility (MOF), Nuclear Training Facility (NTF) and Maintenance Operations Support Trailer (MOST), at the Employer's Wadsworth, Texas facility.

EXCLUDED: All other employees, office clerical employees, guards, and supervisors as defined in the Act.

STP NUCLEAR OPERATING COMPANY

The Board's decision can be found at www.nlrb.gov/case/16-CA-222349 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

